The Birth of Canadian Legal History

> *[O]ur survey of teaching methods and curriculum shows that most students receive no exposure at all to scholarly subjects such as legal history . . .:*
>
> *Arthurs Report* (1983), p135.

Law teachers, a recent comprehensive study suggests, are an embarrassment within the Canadian scholarly community. The great preponderance of legal research and publication is of a busy rather than a fundamental character. It is directed at tidying up the decided cases rather than reflective analysis of the relationship between law and society.[1]

The conclusions of the *Arthurs Report* are unsurprising. The narrow intellectual horizon of Canadian law teachers mirrors (and perpetuates) a regime of legal education which, despite its academic pretension, offers little for the mind. Law faculties hold themselves out as offering a "liberal and professional education in law".[2] But in fact their curricula cater supinely to the ill-informed expectations of the type of student who goes to law school to become a lawyer rather than to study law. Students who think the goal of legal education is to equip them for the first six months of practice seem to get what they want. Students who enter law school under the delusion that they are embarking on an intensive, graduate-level study of the interaction of law and society are sent away empty.

Bleak although the *Arthurs* findings are, they also evidence a gathering resolve to make law an intellectually respectable subject of university inquiry. The very fact that Arthurs and his colleagues have publicly acknowledged that the emperor has no clothes will give courage to those teachers who recognize the need for law faculties to declare their psychological independence from bar societies and to embrace larger social responsibilities. *Charter*-inspired litigation—demanding that courts take formal notice of social facts, come to terms with social science-derived insights and adopt the techniques of what the Americans call "reasoned elaboration"—may propel the emphasis in legal education away from uni-dimensional rule mastery and towards the "law in society" approach. Another hopeful sign of the changing orientation of Canadian law teachers is the recent outpouring of writing in legal history. Although *Arthurs* found that few law students had opportunity to study law in historical perspective,[3] so many

[1] H. W. Arthurs *et al*, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (1983), Chs4-10.

[2] *UNB Law Calendar* (any recent edition).

[3] It is worth noting that, coincident with the recommendations of the *Arthurs Report*, the UNB law school has (after long absence) restored the teaching of legal history to its curriculum from the 1983-84 academic year.

It may also be of some interest that one of the basic recommendations of the *Arthurs Report*—dividing legal education into academic and professional streams—was anticipated in the recommendations of a 1980 report on the state of legal education at UNB: *The Future of the Faculty of Law: A Report to the President of the University of New Brunswick* (1980), p13. The recommendation was rejected by the teaching faculty: *Response of the Faculty of Law to the Report to the President of the University of New Brunswick Entitled "The Future of the Faculty of Law"* (1980), p1.

historians are now aware of the legal dimension of their studies and so many legal academics are now writing in the historical mode that we can already declare that the 1980's have witnessed the birth of a Canadian legal historiography.

Legal history of a sort has long been produced in Canada, built chiefly on sensational cases of the Louis Riel-Stephen Truscott variety. In the Maritime context, the largest-selling book (in English) by any New Brunswicker is Sheriff Bates' account of the remarkable early Nineteenth-century horse thief, Henry More Smith.[4] The success of more recent efforts attests to the continuing popular demand for the genre.[5] There is also a sense in which all traditional legal study is, in its orientation towards the decided cases, a species of legal history. But this is an abstract, "ahistorical" legal history, divorced from time and place. Exposure to it is not apt to encourage the notion that systematic study of law and society in historical perspective is one of the most exhilarating and enriching experiences a student lawyer can have. Now, however, the history of Canadian law is for the first time being written professionally, and with the manifest purpose of putting students in touch with the evolution of their legal culture over the last 250 years.

II

The hallmark of contemporary legal historiography is its interest in viewing the development of law in a social context: to reveal the extent to which legal rules are historically contingent rather than doctrinally inevitable. In no field have scholars been more completely successful in intergrating legal history and "general" history than in the study of the English Middle Ages. Such a large proportion of surviving documentation for the period was generated by the legal process that mediaevalists must necessarily come to grips with the law or be silent. Similarly, in Morton Horwitz's controversial *Transformation of American Law, 1780-1860* (Harvard University Press, 1977) we have a widely-acclaimed attempt to relate American legal developments to the needs of the commercial and entrepeneurial classes in the period before the Civil War. Horwitz's award-winning study is the most important work of U.S. legal history ever written. It has fired the enthusiasm of a whole generation of legal scholars. Indeed, there may be a sense in which most Canadian legal historians have consciously or unconsciously been locked into a Horwitzian frame of reference.

The more successful contributions to Canadian legal history tend to be overlooked in the law schools because they are written by historians who incorporate legal developments into "general" history, rather than by scholars who advertise themselves as *legal* historians. Perhaps the most mature

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[4]Walter Bates, *The Mysterious Stranger* (first published in 1817, reproduced in several editions, and many times reprinted—most recently in 1979).

[5]Other notable examples of the genre are William K. Reynolds, *Old Time Tragedies* (1895) and Barry J. Grant, *Six for the Hangman* (Fiddlehead Press, 1983). Despite its popular focus, Grant's book is an often-deft attempt to link particular cases to broader social and political currents.

attempt to integrate legal and general history is H. V. Nelles' magisterial study of political culture and economic development in modern Ontario.[6] A parallel, if understated, effort to link law and resource exploitation is Graeme Wynn's history of lumbering in Nineteenth-century New Brunswick.[7] Of more recent vintage are two published doctoral theses from the emerging "Queen's School" of Canadian intellectual history: Janice Potter's delineation of American Loyalist ideology and Keith Walden's study of the way American, British and Canadian literature has portrayed the RCMP over the last hundred years.

Potter's *The Liberty We Seek: Loyalist Ideology in Colonial New York and Massachusetts* (Harvard University Press, 1983) argues that articulate Loyalists did indeed have a cogent, perceptive alternative to colonial independence as a resolution to the Anglo-American crisis. Her work is a sophisticated analysis of politics, constitutional law and fundamental ideas about the nature of man and society. It is an attempt to do for the founders of English Canada what Bernard Bailyn did for the American rebels in his masterful *Ideological Origins of the American Revolution* (Harvard University Press, 1967). Yet it will not have the extraordinary impact of Bailyn's brilliant essay. His work on the political ideas of the American Patriots has an importance wholly extraneous to its ostensible subject matter. When we read what the factious were spouting in the 1760's and 1770's, we do so in the conscious knowledge that these were the ideas that subsequently informed the shaping of the American constitution of the 1780's. Conversely, historians have not been much interested in the political ideas of the Loyalists. They may have been, as Potter argues, just as cogent and sophisticated as those of the Patriots, but the military verdict at Saratoga and Yorktown meant that they would never have their chance. One reads Potter's fine study sensing that, however interesting, it is but a polished footnote to history.

Or is it? To a Canadian reader the most stimulating aspect of Potter's reconstruction of a Loyalist "ideology" is the possibility that the ideas that lost out in the Revolution became the ideological blueprint for the explicitly "Loyalist" colonies of New Brunswick (1784) and Ontario (1791). Is Potter's losing ideology English Canada's founding ideology? If so, then her work takes on a wholly greater importance. Potter leaves it to the reader to supply any such frame of reference; and, to be fair, making the case that American Loyalist ideology became an agenda for post-Revolutionary British North America would have required a substantially different book. But the ques-

[6] H. V. Nelles, *The Politics of Development: Forests, Mines and Hydroelectric Power in Ontario, 1849-1961* (University of Toronto Press, 1974).

[7] Graeme Wynn, *Timber Colony: A Historical Geography of Early Nineteenth Century New Brunswick* (University of Toronto Press, 1981). Another outstanding example of an ambitious integration of law and economic development is Elizabeth McGahan's *Port of Saint John: From Confederation to Nationalization, 1867-1927: A Study in the Process of Integration* (National Harbours Board, 1982). Unfortunately for the general reader, McGahan's study is so dense and technical as to be all but inaccessible.

tion remains, and Potter's impressive study makes it possible for other Canadian historians to come to terms with it.[8]

The other notable attempt by a general historian to write legal history is Keith Walden's *Visions of Order: The Canadian Mounties in Symbol and Myth* (Butterworths, 1982). Like Potter, Walden has read widely in a vast, otherwise forgotten literature, reduced his reading to file cards, and arranged his abundant evidence around a number of themes. He does his valiant best to link the image of the Mountie in US, British and Canadian popular literature to the search for a traditional, WASP, frontier hero in a society set adrift by the general loss of verity of the late Nineteenth and early Twentieth centuries. One senses that Walden is right to suggest that the hundreds of Mountie stories he surveys (his bibliography lists 500) have served as an important escapist fantasy in our culture, but theory and evidence are not as seamlessly interwoven as one would find in a mature writer. Indeed, his opening and closing chapters—a fine synthesis of recent work on the importance of myths and symbols in ordering modern Western society, in which the Mounties are scarcely mentioned—stand well by themselves. Altogether Walden gives us a subtle and suggestive partial response to the recurring question of why Canadians remain to a peculiar degree socially deferential and politically bland.

III

It is too soon to expect that innovative, cross-disciplinary studies like those of Potter and Walden will make much impact on the law schools. One book that will be considered for use in the new legal history offerings is Margaret Ogilvie's timely *Historical Introduction to Legal Studies* (Carswell, 1982). Despite its bold title the book is a conventional synopsis of English legal history from the Anglo-Saxons to the present. The last of ten chapters is given over to a survey of Canadian legal development in the light of its British antecedents. The book makes no mention of the United States, and the author evidently assumes that American law has had no impact on Canada's legal heritage.

Ogilvie admits in her preface that the "old-fashioned institutional history" of the type she offers will seem to many "like madness in the late twentieth century" (p*v*), and her assessment of the predelictions of her fellow law teachers is a shrewd one. The tacit conspiracy by the trendy, Liberal, middle class academics who teach at law schools to down-play Canada's British heritage has been wholly successful. Not one law student in a hundred could say where *Magna Charta* stands in New Brunswick, or has any notion of what the *British North America Act* means in conferring on the Federal government a constitution "similar in principle to that of the United Kingdom", or has even heard of *the* Bill of Rights (1688). The present writer resents this puerile and embarrassing attempt to rewrite

[8]Cursory attempts to link Loyalist ideology and the founding of English Canada are offered in Kenneth McRae, "The Structure of Canadian History", in Louis Hartz (ed), *The Founding of New Societies: Studies in the History of the United States, Latin America, South Africa, Canada, and Australia* (Harvard University Press, 1964), and, in the New Brunswick context, in Ann G. Condon, "The Envy of the American States": The Settlement of the Loyalists in New Brunswick: Goals and Achievements (PhD thesis: Harvard University, 1975).

Canada's history as hotly as Ogilvie and amply shares her concern that this aspect of our legal inheritance not remain a black hole in law school curricula. This much being said, Ogilvie's survey does not really succeed in making the history of our legal tradition more accessible to Canadian law students.

Historical Introduction to Legal Studies is not offered as the product of original research and does not look for a specialist audience; there is, therefore, no point in carping about mere errors of fact.[9] But even in terms of the law school audience for which it is intended, this is traditional legal history of the least appealing kind. Written in the "first-one-thing-happened-and-then-another" style, the book is stupifyingly boring; and Ogilvie's synthesis of the work of others is frequently so clumsy that any level of reader would be disconcerted. Moreover, the abundant evidence that neither she nor her publisher has a command of standard English grammar severely inhibits conviction in the substance of what she says. In sum, I agree that Canadian law students need to be introduced to their British heritage and I acknowledge Ogilvie's plucky attempt to fill the need; but making this book the basis for a course would stifle rather than stimulate a student's interest in legal history. As a secondary teaching resource it would have its use, but not more so than several more mature introductions to legal history which come to mind.

IV

In years to come the birth of modern Canadian legal historiography will be dated at 1981, with the appearance of the first Osgoode Society volume of *Essays in the History of Canadian Law.*[10] Superbly produced by the University of Toronto Press, Canada's most prestigious academic imprint, the essays in volume one are prefaced by editor David Flaherty's benchmark survey of the writing of legal history in Canada. Two years later the Osgoode Society consolidated its position as the midwife of Canadian legal historiography by issuing a second, even longer volume of essays.[11] Aware

[9]See, for example, DeLloyd Guth's lengthy catalogue of errors in (1983) 61 *Can Bar Rev* 909. Any specialist could add others, but I think that in itself is of no great consequence.

[10]Essays in Vol I (1981) are: David Flaherty, "Writing Canadian Legal History: An Introduction"; Kathryn Bindon, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land, 1839-54"; R.C.B. Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario: A Perspective"; John Blackwell, "William Hume Blake and the Judicature Acts of 1849: The Process of Legal Reform at Mid-Century in Upper Canada"; Paul Craven, "The Law of Master and Servant in Mid-Nineteenth-Century Ontario"; Constance Backhouse, "Shifting Patterns in Nineteenth-Century Canadian Custody Law"; Graham Parker, "The Origins of the Canadian Criminal Code"; Jennifer Nedelsky, "Judicial Conservative in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law, 1880-1930"; Jennifer Stoddart, "Quebec's Legal Elite Looks at Women's Rights: The Doiron Commission, 1929-31"; Margaret Banks, "An Annotated Bibliography of Statutes and Related Publications: Upper Canada, the Province of Canada, and Ontario, 1792-1980".

[11]Essays in Vol II (1983) are: William Wylie, "Instruments of Commerce and Authority: The Civil Courts in Upper Canada, 1789-1812"; Blaine Parker, "Legal Education in Upper Canada, 1785-1889: The Law Society as Educator"; Paul Romney, " 'The Ten Thousand Pound Job': Political Corruption, Equitable Jurisdiction, and the Public Interest in Upper Canada, 1852-6"; Constance Backhouse, "Nineteenth-Century Canadian Rape Law, 1800-92"; Paul Craven, "Law and Ideology: The Toronto Police Court, 1850-80"; Hamar Foster, "The Kamloops Outlaws and Commissions of Assize in Nineteenth-Century British Columbia"; Jamie Benidickson, "Private Rights and Public Purposes in the Lakes, Rivers and Streams of Ontario, 1870-1930"; R.C.B. Risk, " 'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario"; Margaret Banks, "The Evolution of the Ontario Courts, 1788-1981".

that their efforts were propelling the writing of Canadian legal history into the modern world, the Osgoode Society's high profile membership ensured that publication of these fine volumes would be widely recognized as an event of national significance. The effect of this well-merited fanfare was to overshadow the appearance in 1981 of yet another collection of essays in Canadian legal history: Louis Knafla's edition of papers delivered at a Crime and Criminal Justice Workshop at the University of Calgary.[12]

Although collections of essays are inevitably uneven in quality, the standard of the Osgoode publications is very high. Several of the authors are presenting the results of graduate research, which tends to be densely textured, but other essays—like Risk on law and the Ontario economy and Parker on the origins of the Criminal Code—are the work of mature historians. The content of the second volume is less predictable—and for that reason more interesting—than the first. Risk's article on the origin of workers' compensation, Craven's on the Toronto Police Court and Benidickson on water law and Ontario economic development are particularly impressive. There is so much to welcome and praise in the Osgoode essays that anything less than unqualified ovation may seem uncharitable. I would therefore emphasize that I have nothing but admiration for the scholarship they reflect. Yet I would offer a few observations about the general contours of the volumes.

Legal historiography cannot be judged on a less rigorous standard than other forms of history. It is, therefore, fair to point out that in most cases the essayists have contented themselves with published source material when general historians would not have hesitated to plunge into the archives. A mature Canadian legal historiography will have to come to terms with the possibilities and perils of archival research. As well, it cannot but be noted that, of the nineteen essays printed in the two volumes, fourteen are on Ontario, two on the West, one on Quebec, one on the Federal jurisdiction and one on historiography. Almost all of the essays are on private law and only a few stray outside the Nineteenth-century. The Osgoode essays are, therefore, about civil law in Nineteenth-century Ontario. While this remarkable imbalance to some extent reflects the research interests of those presently in the field, the best evidence of the real centrist slant of the Osgoode materials is a look at the five Canadian essays in Knafla's 1981 volume on *Crime and Criminal Justice in Europe and Canada* (Wilfred Laurier University Press). As its title suggests, all are on criminal law—a subject virtually ignored in the Osgoode collection—two are on Eighteenth-century Quebec (including a fine one by Douglas Hay), one is on the West and two are on the Federal jurisdiction. Clearly, then, the survey of Canadian legal history represented in the Osgoode collection is more than randomly biased towards the meridian of Toronto.

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[12] Louis Knafla (ed), *Crime and Criminal Justice in Europe and Canada* (Wilfred Laurier University Press, 1981). Those essays on Canadian subjects are: Douglas Hay, "The Meanings of the Criminal Law in Quebec, 1764-1774"; André Lachance, "Women and Crime in Canada in the Early Eighteenth Century, 1712-1759"; Simon Verdun-Jones, " 'Not Guilty by Reason of Insanity': The Historical Roots of the Canadian Insanity Defence, 1843-1920"; T. Thorner & N. Watson, "Patterns of Prairie Crime: Calgary, 1875-1939"; W. A. Calder, "Convict Life in Canadian Federal Penitentiaries, 1867-1900".

Finally and most importantly, the agenda for Canadian legal history established by David Flaherty, the Osgoode Society's editor, is explicitly American in its orientation.[13] Nowadays the "American" approach to legal history is that patterned by Willard Hurst and brought to its most influential form by Morton Horwitz. The Horwitzians take as their point of departure the insight that legal developments tend to favour the interests of the economically powerful, and that the study of legal history is the study of how judges, lawyers and legislators have combined to give the business class the law it needs. Horwitz brought his theory and evidence to bear on pre-Civil War US private law in a book that everyone acknowledges as a brilliant—if deeply flawed—*tour de force*.[14] David Flaherty thinks we must all be Horwitzians now.

It is obvious that many of the Osgoode essayists (including R.C.B. Risk and his students) would find Horwitzian instrumentalism in Nineteenth-century Ontario, if only they could. On the evidence they have been largely unsuccessful. Even Risk admits that Ontario's judges were a dreary, intellectually passive, unimaginative lot, mindlessly aping English courts rather than giving Ontario capitalism the law it "needed".[15] But the mere fact that Horwitzian instrumentalism is too facile a model for use in analyzing the social and economic consequences of the work of Canada's intensely colonial courts does not mean that Canadian legal historians—many of whom now do graduate work with Horwitz at Harvard or write theses under Risk at Toronto—will not continue to pine for the ideological piquancy of a Horwitzian analysis of Canadian law.

Canadians seem to have an almost bottomless capacity for intellectual colonialism. Our lawyers and legal academics have long been willing colonials for English law. The result has been the near total inability of Canadian courts to think for themselves, even in such wholly un-English fields as aboriginal entitlement. Lately, however, as Canadians have come to take their LL.M.'s in the US rather than in the UK, one notices an increasing tendency for legal academics to trumpet the forty-year-old insights of American legal realism with all the fervor of an immediate revelation from heaven.[16] It would be unfortunate indeed if this country's emerging legal historians were to join this trend by embarking on a breathless and unreflecting rush to an American model for Canadian legal history.

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[13] Vol I, "Writing Canadian Legal History", *passim*.

[14] *The Transformation of American Law, 1780-1860* (Harvard University Press, 1977), especially pp253-66.

[15] Vol I, "Law and the Economy", pp. 122 and 125.

[16] See, for example, B. J. Reiter & John Swan, *Studies in Contract Law* (Butterworths, 1980), *passim*.

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